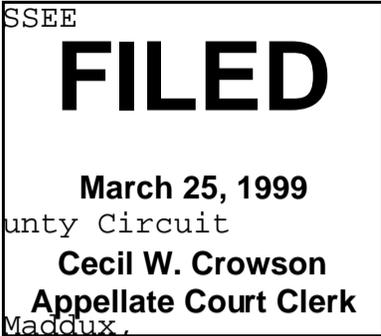


IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



JAMES R. SIMPSON	)	Overton County Circuit
	)	No. 3264
Plaintiff/Appellee	)	
	)	Hon. John Maddux,
v.	)	Judge
	)	
LIVINGSTON LIMESTONE CO., INC.)	)	S. Ct. No. 01-S-01-9712-CC-00282
	)	
Defendant/Appellant	)	AFFIRMED

JUDGMENT ORDER

This case is before the Court upon defendants' motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by defendant-appellant and surety, for which execution may issue if necessary.

PER CURIAM

Barker, J., not participating

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(December 11, 1998 Session)

JAMES R. SIMPSON, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
LIVINGSTON LIMESTONE )  
CO., INC., )  
 )  
Defendant-Appellant. )

OVERTON CIRCUIT  
Hon. John Maddux,  
Judge.  
No.01S01-9712-CV-00282

**FILED**  
March 25, 1999  
Cecil W. Crowson  
Appellate Court Clerk

For Appellant:

Jeffrey P. Boyd  
Allen & Kliner  
Jackson, Tennessee

For Appellee:

Randall A. York  
Upchurch, Colvard, York &  
Ramsey  
Crossville, Tennessee

MEMORANDUM OPINION

Members of Panel:

William M. Barker, Associate Justice  
William H. Inman, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED  
Judge

Loser,

## MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Livingston Limestone Co., Inc., insists the trial judge erred in finding the employee's hernia to be compensable and that the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Simpson, initiated this civil action to recover disability benefits because of a hernia. After a trial of all the issues, the trial judge found the hernia to be compensable under the Workers' Compensation Act and awarded, *inter alia*, permanent partial disability benefits based on forty-seven percent to the body as a whole. We have reviewed the case *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

The claimant is 34 years old with an eighth grade education, who worked for the employer as a truck driver. On July 19, 1995, he sought medical treatment from Dr. Leonard Carroll for a left inguinal hernia. The doctor surgically repaired the hernia and released the claimant to return to work on August 30, 1995. The repair was complete. The claimant returned to work and made no claim for workers' compensation benefits.

On October 16, 1996, while lifting a heavy object in the course of his employment, the claimant felt a sharp pain in his left side and testicles, causing him to feel sick. He informed his supervisor and the next day visited Dr. Carroll. The claimant testified that the second hernia appeared suddenly and immediately following the lifting episode, was accompanied by pain and did not exist, to his knowledge, before the accident. The second hernia was also repaired by Dr. Carroll, who thereafter restricted the claimant from lifting over 10 to 15 pounds, stooping, crawling, climbing, jogging, running, operating any heavy equipment requiring the use of a clutch, moving both feet while working with the hands or engaging in vigorous exercise.

Dr. Carroll testified that the second hernia was a new one. Dr. Hargreaves, after reviewing medical records from the first hernia and the operative report from the second one, agreed. The treating doctor estimated the claimant's permanent impairment at twenty-five percent. The claimant has returned to work.

The Tennessee Workers' Compensation Act deals specifically with claims for compensation benefits for hernia or rupture. Tenn. Code Ann. section 50-6-212. In such cases, the claimant must be able to satisfactorily show the following:

- First. That there was an injury resulting in a hernia or rupture.
- Second. That the hernia or rupture appeared suddenly.

- Third. That it was accompanied by pain.
- Fourth. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.
- Fifth. That it immediately followed the accident.

It has been held that a hernia is "immediate" if it appears so soon after the injury that it would not be possible to attribute it to any other cause. Etter v. Blue Diamond Coal Co., 187 Tenn. 407, 215 S.W.2d 803 (1948). Aggravation or exacerbation of a congenital or non-compensable hernia is not covered; Capps v. Goodlark Medical Center, 804 S.W.2d 887 (Tenn. 1991); but when an employee has a recurrence of a compensable hernia or in the course of employment he aggravates a previously compensable hernia, he is entitled to further compensation benefits, if causation is proved. Cook v. Great West Cas. Co., 779 S.W.2d 365 (Tenn. 1989). The existence of a prior hernia or rupture on the same site as a current hernia will not necessarily defeat recovery where the new hernia meets the statutory criteria for compensability. Capps v. Goodlark Medical Center, 804 S.W.2d 887 (Tenn. 1991). Since the proof establishes that this claimant's second hernia meets the statutory criteria for compensability, the first issue is without merit.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. section 50-6-241(a)(2); McCaleb v. Satum Corp., 910 S.W.2d 412 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the courts to determine the percentage of the claimant's industrial disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983). Moreover, we are not at liberty to substitute to substitute our own opinion as to the extent of an injured worker's disability for that of the trial judge. *See* Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998).

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the defendant-appellant.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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William M. Barker, Associate Justice

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William H. Inman, Senior Judge